



A Path Forward After *Comcast*:

A New Approach to Universal Service Reform

Ex Parte Presentation

WC Docket No. 05-337 ; CC Docket No. 96-45; and GN Docket Nos. 09-47, 09-51 & 09-137

The *Comcast* Decision Emphasized the Limited Scope of the FCC's Ancillary Authority

- » Policy statements alone cannot provide the basis for the FCC's exercise of ancillary authority
- » The Court in *Comcast* signaled that the “statutorily mandated responsibilities” upon which the FCC seeks to base ancillary authority must be clear, emphasizing that “administrative agencies may [act] only pursuant to authority delegated to them by Congress”
- » In light of the *Comcast* decision, the FCC should seek to exercise ancillary authority only when necessary to further specific objectives that clearly fall within its “statutorily mandated responsibilities”

The FCC Lacks the Authority to Adopt Many of the NBP's Universal Service Recommendations

- » The NBP recommends that the FCC eliminate universal service funding for common carrier services in order to provide universal service funding for non-common carrier services
- » If universal service funding for common carrier services were entirely unnecessary, the FCC could not justify the funding of non-common carrier services as necessary to achieve any "statutorily mandated responsibilities"
- » The FCC faces three choices:
 - » The FCC could reclassify broadband services as "telecommunications services";
 - » The FCC could wait until Congress amends the Act before proceeding with the NBP's recommendations; or
 - » The FCC could seek to achieve the goals of the NBP by implementing measures that are based directly upon the provisions of the current Act

The FCC Can Achieve the NBP's Goals Under the Current Act Without Service Reclassification

- » The USA Coalition has proposed an alternative approach to universal service reform that would permit the FCC to achieve the goals of the NBP without reclassifying services or waiting for Congress to act
- » The USA Coalition's proposal is based directly upon the requirements of the current Act
- » The USA Coalition's proposal reflects the NBP's observation that the deployment of networks currently used to provide narrowband services can enable and facilitate the subsequent deployment of broadband services
 - » For example, the Mobility Fund proposed in the NBP seeks to improve the deployment of 3G networks in order to facilitate the subsequent roll-out of 4G networks
- » The FCC could facilitate the deployment of broadband services without service reclassification by (1) immediately clarifying that ETCs can use funding for networks and facilities that support broadband services and (2) beginning the process for implementing the USA Coalition's reform proposals
 - » Because the current list of supported services can be provided using narrowband or broadband networks, the universal service funding mechanism should not inadvertently create disincentives for the deployment of facilities and networks that support broadband services

The FCC Should Immediately Clarify that ETCs Can Use Funding For Broadband Networks

- » Section 254(c) of the Act provides in relevant part that universal service “is an evolving level of **telecommunications services** that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.” (emphasis added)
 - » The Act makes clear that universal service support can only be provided for telecommunications services
 - » The Act also makes clear that the FCC must consider advances in all technologies and services
- » Consistent with the requirements of the Act, the Commission should immediately rule that:
 - » ETCs can use funding for networks that currently are, or will soon be, used to provide supported services; and
 - » ETCs can use narrowband or broadband networks to provide supported services
 - » ETCs can use funding to support broadband internet services so long as the ETC voluntarily agrees to offer the underlying transmission component as a telecommunications service
 - » The FCC has already ruled that an internet service provider may choose to offer the transmission component of a broadband service as a telecommunications service

The Foundation for a New Approach to Universal Service

- » The universal service provisions of the Act require the FCC to ensure that Americans living in “rural, insular and high-cost areas” have service options “reasonably comparable” to those available in “urban areas”
- » The best way to achieve universal service and to foster the deployment of the fastest and most efficient services is to focus on removing the obstacles that service providers face in unserved and underserved areas
- » Two primary obstacles impact all types of technologies – apart from satellite – and all types of competitors – ILECs and CETCs (collectively, “ETCs”), regardless of data transfer rates:
 - » **Low population density** (*i.e.*, fewer subscribers from whom to recover costs)
 - » **Higher cost of service** due to harsh terrain (*e.g.*, mountains, swamps, volcanic rock, tundra, lack of access), population distribution issues (*e.g.*, longer and more expensive backhaul) and other issues
- » The New Approach addresses these two primary obstacles directly so that universal service support funding will be more effective
 - » By addressing the primary obstacles directly, the new approach eliminates artificial distinctions based on technology (*e.g.*, wireline or wireless), competitive status (*e.g.*, ILEC or CETC), or current speed of service (*e.g.*, “broadband” or “narrowband”)
- » Setting arbitrary requirements with respect to speed or type of service will only inhibit the deployment of both broadband and voice services in rural areas

Summary of the New Approach

- » The FCC would identify areas where support is necessary from the perspective of the consumer ("Supported Areas"), which the FCC would reexamine on regular intervals
- » Support is necessary wherever Americans living in "rural, insular and high-cost areas" lack access to service options that are "reasonably comparable" to those available in "urban areas" in terms of relevant characteristics as defined by the Commission
- » In each Supported Area, the FCC would calculate the amount of necessary support
 - » The FCC would calculate a "Reimbursement Percentage" for each Supported Area to reflect the percentage by which the cost to serve each potential subscriber in the Supported Area exceeds the cost to serve each potential subscriber in an Average Urban Area
- » ETCs would be reimbursed for all eligible expenditures (*i.e.*, CapEx & OpEx) made to serve the Supported Area based upon the Reimbursement Percentage for the Supported Area
- » The New Approach would be phased in over a 10 year period

The FCC Can Manage Fund Size Without The Harm Caused by Reverse Auctions

- » The best means for controlling fund size over time is to ensure that:
 - » Support is available only where necessary to achieve explicit and measurable goals;
 - » The amount of support available is **no less** than the amount necessary to achieve the stated goals; and
 - » Support is distributed in a manner that does not insulate recipients from competition or skew market forces such that barriers to entry or competition are increased
- » Single-winner reverse auctions control fund size at the expense of consumers and competition
 - » The winner of a single-winner reverse auction can set pricing at a level that (1) discourages entry by potential competitors and/or (2) drives non-subsidized providers of other services out of the market (e.g., unsubsidized narrowband providers currently serving an area where support for broadband service is distributed in a single-winner reverse auction)
 - » Monopoly service providers offer consumers fewer choices at higher prices than providers who face actual competition or even merely the threat of competitive entry
 - » Insulated from competitive forces, the winner of a single-winner reverse auction would have little incentive to expand or improve service offerings above minimum mandated levels
- » The USA Coalition's proposal would permit the FCC efficiently to control fund size without causing the harms that result from reverse auctions



Questions?

Please contact:

Todd D. Daubert
Kelley Drye & Warren, LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
(202) 342-8602
tdaubert@kelleydrye.com